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ABSTRACT

Intended as a guide for policy makers and associations that deal with educational interests, this report from the Indian Education Project of the Education Commission of the States describes the involvement of tribal, federal, and state governments in Indian education: looks at their intergovernmental relationships: and identifies areas of conflict between them. Background information traces the efforts since 1969 to improve the availability, quality, and relevance of education services for American Indians. Narrative sections explain the past and present roles of each of the federal, state, and tribal governments and discuss their legal, financial, and administrative responsibilities in educational affairs. The report also identifies specific areas of conflict in jurisdiction, funding, and control of schools, and suggests potential options available for cooperative involvement. As a result of this study, additional reports are to be generated on problems, programs, policies, and legislation in an effort to stimulate a combined response to the needs in Indian education. (JD)

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INDIAN EDUCATION

Involvement of Federal, State and Tribal Governments

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INDIAN EDUCATION

Involvement of Federal, State and Tribal Governments

Education Commission of the States
Denver, Colorado
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Report No. 135

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September 1980

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The Indian Education Project of the Education Commission of the States (ECS) has two primary goals: (1) to identify and discuss the states' involvement in the education of Indian students; and (2) to suggest ways to coordinate federal, local and tribal activities so that state responsibilities to Indian education may be effectively met.

The five states that participated in the study are Alaska, Minnesota, Montana, Oklahoma and South Dakota. A national advisory task force composed of Indian and non-Indian leaders primarily from these states gathered and synthesized pertinent information about existing practices and programs. Through research and task force input and concurrence, the project staff will prepare and disseminate a series of project reports nationwide.

The task force will suggest program modifications – either through policy changes or the legislative process – that could be of value to the participating states, as well as to other states with Indian populations. In addition the project seeks to determine promising practices that can be shared.

The Education Commission of the States Task Force statements on Indian education stated herein recognize the federal trust responsibility established by the Congress of the United States through treaties made with Indian nations, legislation and court decisions. These precedents emphasize Indian sovereignty, Indian self-determination, and full involvement of the Indian communities at the local, state and national level in the establishment of educational policy for Indian citizens.

The Education Commission of the States Task Force also recognizes that the states have the primary responsibility to educate all Indian children and adults while the federal and tribal responsibility is to meet the unique educational and cultural needs of Indian students and adults.

It is further recognized that a cooperative effort between all groups concerned, regarding policy making and funding, must be implemented to achieve the full intent of this report – improved education for Indian people.

Preface

This report: *Indian Education: Involvement of Federal, State and Tribal Governments* is intended to serve those individuals who do not have a comprehensive understanding of the complexities of Indian education, but who, in their official capacities, must make policy decisions in this crucial education area.

The report has been prepared especially for policy makers in state legislatures; state education agency personnel, policy-making bodies, such as state and local boards of education; and various associations supportive of educational interests. It is intended to aid tribal governments and federal and state officials in determining the respective roles of the various government entities.

It is hoped that this initial report of the Indian Education Project will also serve to stimulate further discussion. Additional reports on problems in need of resolution, selected programs and practices, policy recommendations and existing state legislation will be forthcoming. It is important that education officials, Indian tribes, and people at all levels of government come together to implement the suggested education activities and to share responsibilities for educating the Indian child. The challenge is to generate a combined response to the needs in Indian education.

The project staff is appreciative of the efforts of consultants — Myron Jones of Indian Education Training, Inc., Albuquerque, N.M.; David Getches, University of Colorado Law School, Boulder, Colo; and David Beaulieu, Sinte Gleska Community College, Rosebud, S.D. for their review of the report.

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I. Background Information

In 1969 the U.S. Senate Subcommittee on Indian Education, after an extensive review and study of the history and status of American Indian education, published its final report, *Indian Education: A National Tragedy — A National Challenge.* The intensive and far-reaching manner in which the challenges presented in 1969 have been accepted during the last decade is unequaled in the history of Indian education.

During the last 10 years the federal government has substantially expanded its fiscal involvement and the programmatic options available to meet the unique needs of American Indian learners. New legislation and changes in the rules and regulations of past programs has caused a significant reorganization and restructuring of the federal bureaucracy and major shifts in the interaction of tribal, state and federal governments in the development, funding, management and operation of education services and programs for American Indians.

During the same period Indian tribal governments, communities, concerned individuals and parents have extensively involved themselves in an unprecedented manner, directly and indirectly in the development, management and operation of Indian education programs and schools. Initiating and sustaining the efforts of the past 10 years, American Indians have also developed and involved themselves in local, regional and national Indian organizations defining the education needs of American Indian learners and supporting efforts to meet these needs.

In many states with large Indian populations, the last decade has witnessed an emerging interest on the part of state government for Indian education. It has become a distinct concern inclusive within the state's broad definition of its general responsibility to meet the education needs of all citizens, including American Indians.

Despite the efforts and approaches of the past 10 years and many examples of success, American Indians generally continue to lag behind non-Indians in educational attainment, with slightly more than 33 percent having only an elementary education or less. Only 3.5 percent of all Indian men and 2.5 percent of Indian women have four years or more of college, and for reservation Indians the

figures are even lower. Nearly one-half of all reservation Indians have only an elementary education or less and only one-fourth have managed to attain a high school diploma. As they advance through the educational process, Indian students tend to fall farther behind non-Indian students in achievement. Recent statistics indicate that the dropout rate remains high for both reservation and non-reservation Indian students. Proportionately fewer Indian high school students graduate than do non-Indian students.

The current picture in Indian education presented by recent history is one of a significant beginning. With the vast majority of American Indian learners enrolled within state public schools, ever more effective ways to coordinate tribal, federal and state involvement in Indian education must be sought.

However, the approaches and efforts of the past 10 years to improve the availability, quality and relevance of education services for American Indian learners has revealed, by the nature of the successes and failures, the immense complexity of the instructional and curricular issues for American public education presented by the social-cultural uniqueness and diversity of American Indian leaners. Public school systems have only just begun to understand the complexity of the instructional and curricular issues related to American Indian education. Major challenges remain to develop instruction programs that enable achievement and to develop curricular programs that facilitate community and tribal social-cultural objectives.

More than 800,000 Indians, Eskimos and Aleuts live within the United States. Culturally they represent 481 identifiable tribal groups exhibiting vast differences linguistically and culturally, both within and between groups. Legally they represent over 280 organized political entities having rights and powers of self-government with distinct jurisdictional boundaries, limiting the exercise of many aspects of state jurisdiction over resident American Indians. Geographically, 50 to 60 percent of all American Indians live outside reservations, many of them in rural settlements or in small towns near reservations. Approximately 30 percent of all American Indians reside within large urban centers. Although there is considerable variability in social economic characteristics among Indian individuals and between urban, rural and reservation communities, the overall picture is one of widespread poverty.

Many researchers and commentators have identified social-cultural factors to explain why Indian children fare so poorly in American public schools. For example, some experts suggest it is because of

language barriers. Indian languages are quite different from English, and many Indian children do not encounter English until they attend public school. Indian children often lack the basic educational tools that are often taken for granted by non-Indians; consequently Indian children often have to play a "catch-up" game. Still others suggest that, with few Indian teachers available, children are often taught by non-Indian teachers, many of whom are unaware of special needs or problems. Some educators also suggest that Indian children do poorly because of the frequent use of culturally biased tests, an absence of bilingual and bicultural programs, lack of Indian success role models, low expectations afforded Indian children by insensitive teachers, and an inability of many Indian advisory boards to influence the education process.

In 1973 Joy Hanley, director of Elementary Education for the Navajo Nation, stated that "the public schools are still assuming that they are teaching children that have come out of middle-class white homes. Teachers don't realize that there is a cultural difference and that there should be special programs to teach Indians what they need to succeed in society and to build self-confidence and self-images." She also suggested that public schools are designed to build the self-image of Anglo children and that minority children, particularly Indians, feel inferior in a structure that provides little or no support for their self-image.[1]

Some teachers have expressed concerns about what is happening in the classroom, indicating that Indian students are falling behind in the third or fourth grade and that many must repeat grades more than once. To help Indians overcome problems associated with education, poverty and lack of employment, many people believe that schools must reorient and redesign programs focused on the Indian child.

Tribal leaders and many educators believe that "quality" education for Indian children must be more clearly defined. They insist it is not enough to give Indian pupils "equal educational opportunity," because many Indian children cannot effectively utilize that opportunity as it is now structured. Opening schools to them does not help if the program is not flexible enough to meet their needs. Quality education must include strong counseling programs, school interaction with the parent and the home situation, and curricular options that permit the Indian child to maintain tribal traditions and cultures. It is believed that a strengthened self-concept as an Indian will enable the student to compete with others for postsecondary education and possible career options.

The suggestions for change implied by researchers and commentators on Indian education present major challenges for American public education in developing instructionally functional school programs capable of improving the educational performance of American Indian learners. Whether schools develop instruction programs that are congruent to the culturally determined dispositions for the learning of American Indian students or develop compensatory programs that effectively socialize Indian learners to school-related expectations for learning; either approach will require diligent on-site application and development of current knowledge concerning cross-cultural education.

For many Indian tribes and communities the social-cultural dimension of Indian education is not only an instructional issue but a curricular one as well. Outside of enabling American Indian learners to achieve better within schools, many Indian tribes and communities seek the development of curricular programs which, facilitated by virtue of their content, locally define social and cultural objectives. These objectives not only include the retention and maintenance of traditional culture and language but particularly within reservation areas extend to include the political, social and economic objectives of tribal government. For example, the need for Indian students to understand the history of their tribe, its constitution and their rights and responsibilities as citizens of their tribe, is just as important for Indian tribes as the study of state history and government.

Though the nature of intergovernmental relationships between tribal, federal and state governments has been historically complex, the efforts and approaches of the past 10 years have also revealed the complexity of current definitions and perceptions concerning the role and responsibility of tribal, federal and state governments and the nature of intergovernmental relationships in the provision of education services to American Indians. Despite the complexity, with the vast majority of American Indians enrolled in state public schools, there exists a major need to coordinate the involvement of tribal, federal and state involvement in the development and offering of education services for American Indians. Since federal and tribal governments and independent Indian community corporations also manage and operate schools for American Indians, the need for coordination and cooperation is not a unilateral concern.

There exist as many jurisdictional focuses around which to merge the activities of each government entity involved as there are government entities. Each have advantages and disadvantages practically, financially and politically. Each, depending on the

current nature of intergovernmental involvement in Indian education in particular states, has varying levels of feasibility or advocacy.

The report seeks, by its distinct descriptions of the involvement of tribal, federal and state government in Indian education, to clarify the complexity of intergovernmental relationships identifying areas of conflict or confusion, and thereby illuminate the potential options available for cooperative involvement.

II. Federal Involvement

Introduction

Education policies for Indians parallel the often turbulent history of European conquest and colonization of the New World. When Europeans first named the people on this continent "Indians," the term was collectively applied to about 200 societies, each speaking a different language or dialect. Tribes differed vastly in economic, social and religious life, but because of European policy and action, Indian people came to an awareness of their unique comprehensive status as a "separate people."

During the colonial period, various approaches were used by the Europeans to educate the natives on this continent. The earliest missionaries were Roman Catholic priests, most of them Jesuits. They taught Christianity and the French culture, in particular. Traditional academic subjects as well as singing, agriculture, carpentry and handicrafts were emphasized. The Franciscans, mostly Spanish in origin, came into the South with Coronado and influenced the people of Arizona, California, New Mexico and Texas. They taught Spanish, agriculture, blacksmithing, carpentry, masonry, spinning and weaving, but not the academic subjects.

Protestant missionaries established schools, most of them in the East. Harvard was established for the education of English and Indian youth, and the College of William and Mary included a special house for Indian students. The schools of the colonial period existed primarily to spread Christianity and to transmit Western culture and civilization into the New World. They touched very few Indian people and met with a conspicuous lack of success.

With the advent of the new nation, the federal government retained jurisdiction over Indian affairs, including that of Indian education. The emphasis in education was on assimilating the Indian into the mainstream of American society.[2]

During the early 1800s, Indian education was influenced by a great religious awakening. Encouraged by Congressional funding, many churches used the primer, the hoe and plow to "civilize" the Indian. The federal government avoided running schools whenever

possible and continually sought to turn over the responsibility to other agencies. Early in the 19th century, funds were distributed to certain religious denominations to maintain mission schools. The federal government often used a "mission contract" system whereby any mission could operate school facilities as long as they complied with federal requirements. Public protest against sectarian schools and the unconstitutional nature of such federal funding, however, forced the federal government to close out all mission schools by the late 1800s.

The federal government turned to federally operated schools run by the Bureau of Indian Affairs (BIA) for Indian children in the late 19th century. Abandoned army forts near reservations were converted into boarding schools. Children were often removed forcibly from their homes, and students were boarded out to white families during vacation times. Native religions were suppressed.

In 1887 the Dawes General Allotment Act authorized division of tribal lands into small parcels that were alloted to individual Indians who were expected to learn to be agriculturists and become self-sufficient by cultivating the land. This act was passed due to the clamor of white settlers for access to Indian lands, and was calculated to legally steal tremendous amounts of Indian land. The most notable and unfortunate results of the act was the passage of over 90 million acres of land from Indian to non-Indian hands and the undermining of most tribal governments. Education policies reflected the notion that reservations would become "schools" for preparing Indians to enter society, eventually, as citizens. Basic literacy and vocational training were stressed in poorly financed federal boarding schools.[3]

Beginning in the 1930s the federal government pursued an education policy that de-emphasized forced assimilation of Indians into the mainstream of society and recognized the value of preserving Indian cultures. The policies favored improving federal boarding schools on the reservations and encouraging the enrollment of Indians in public schools near their home communities rather than in distant off-reservation federal boarding schools.[4] To ease the burdens on the states, the Johnson-O'Malley Act (JOM) authorized federal assistance to public schools educating Indians. These positive efforts, however, were followed by the termination philosophy of the 1950s. During this era, many tribes were terminated thereby losing federal recognition that is essential to tribal governments. Termination reduced prosperous tribes to a poverty level existence. The policy of "termination" of federal involvement in Indian education has been followed by a new

"self-determination" policy favoring assumption of many aspects of responsibility for education by Indians themselves.

At the present time, and in accordance with the administration's policy of Indian self-determination, 44 schools enrolling approximately 5,000 students are now operated by Indian communities with funding provided by the federal government under contracts with the BIA. In the federal Indian school system which is operated by the BIA, there are 23,705 day students and 16,930 Indian students in boarding schools, as well as 2,493 students living in dormitory facilities operated for students attending public schools distant from their homes.

Today there are 413,561 Indian students enrolled in the public schools. This number added to the BIA and contract school figures show a total Indian student population, from all schools, of 459,196 students. (Figures are from 1979-1980 U.S. Department of Education/Office of Indian Education and the BIA.)

In higher education, funded by the BIA, for the fiscal year 1979 alone, $27,398,300 was expended on some 21,000 undergraduate Indian students; $1,888,100 went to institutions enrolling 1,471 students in special graduate and advanced degree programs.

Positive efforts are being made to educate Indian children in the public schools. Successful efforts are also being made by the federal government to encourage Indian-operated schools. Indian involvement in the education of Indian children is encouraged by the federal government.

Constitutional Arguments

The federal government has certain responsibilities to make sure that education reflects national goals and priorities. It has the power to raise revenues and distribute resources, and it has a broader perspective, detached from regional interests. A number of legal scholars suggest, therefore, that there is a strong argument for the direct involvement of the federal government in overall education and, certainly, in Indian education which is an area traditionally addressed by federal policy.

A federal involvement with Indian education can be predicated on many existing and still enforceable Indian treaties, and upon federal statutory provisions. The federal government has made an ongoing commitment to provide sufficient basic services to Indian communities. It can be argued that these historical commitments create an important continuing role for the federal government in

the education of Indian children. It is argued that the far-reaching federal power over Indians implies a duty for the federal government to provide essential services.

An unbroken current of judicial decisions has called for the United States to exercise care and protection of all dependent Indian communities within its borders. When many states were admitted into the Union, Congress, in the enabling legislation, expressly prevented full operation of state law within Indian reservations. Some people believe that a federal responsibility in Indian education can be inferred from the power that the Constitution gives to Congress to regulate commerce with Indian tribes.

Some argue that by the Act of March 3, 1819, Stat. Chap. LXXXV, Congress assumed the responsibility for Indian education. The Act states that it was "designed to provide against the further decline and final extinction of the Indian tribes adjoining the frontier settlements of the United States, and for introducing among them the habits and arts of civilization." According to Vine Deloria, an outstanding Indian scholar, this statute recognized the obligation of the United States to provide Indians with education. He maintains that prior to this, federal involvement was based solely on the various treaties between Indian tribes and the federal government.[5]

The Courts

The courts often have supported the legality of a federal role and responsibility for Indian affairs and education. The landmark case often cited is *Cherokee Nation v. Georgia*, 30 U.S. 1,8 (1831). In its decision, the Supreme Court outlined the relationship of Indian tribes to the federal government as that of a "ward to his guardian." From this statement of relationship, some educators have concluded that Indian education is indeed a responsibility of the federal government.

Other educators have suggested that *Worcester v. Georgia*, 31 U.S. 515 (1832) mandated a trust responsibility and obligation for the federal government to participate in such areas as the education of Indian children. And in *United States v. Kagama*, 118 U.S. 375 (1886), they argue that the trust responsibility was further reinforced by the statement that "these Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been

recognized by the Executive Branch and by Congress, and by this court, whenever the question has arisen."

Again in *Seminole Nation v. United States* 316 U.S. 286 (1942), a number of educators emphasize that the court gives a very definite reason for the federal government to participate actively in the education of Indian children. In this decision, the U.S. Supreme Court stated that, "Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it (the Government) has charged itself with moral obligations of the highest responsibilities and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Morton v. Mancari 417 U.S. 535 (1974) recognized Indian preference hiring practices in the BIA as strong furtherance of the federal government's trust obligation toward Indian tribes. This case also recognized the importance of education programs established under the Indian Reorganization Act of 1934 and under subsequent Indian education legislation as contributing to both the self-government of Indian tribes, and to the trust obligation of the federal government to Indian education.

Courts have permitted great latitude for discretion on the part of Congress and the executive branch for determining how trust obligations will be carried out. Consequently, while the United States may be obligated by treaty to some tribes for specific education services, and a general obligation can be inferred from other treaties, courts are unlikely to question the government's choice of means for participating in Indian education.

Legislative Authority for Financial Support

During the 19th century, funds were given to various Indian tribes to fulfill treaty obligations, usually with little or no accompanying funding for education — although some funding was supplied to various "mission" societies to educate Indian people. After 1870 and until the early 1950s, Congress began to appropriate dollars for education an annual basis.

In 1921 the Snyder Act was passed. It instructed the Secretary of the Interior "to direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care and assistance of Indians throughout the United States." Purposes for which funding could be provided included "general support and civilization, including education." Off-reservation boarding schools

received such special funding. From time to time, costs of construction as well as maintenance and repair of school buildings were included in these special projects.

In 1934 Congress, in the Johnson-O'Malley Act (JOM) gave the Secretary of the Interior broad authority to contract with individual states and local agencies for the education of Indian children. The primary intent of the act was to shift Indian education to a state-level responsibility. JOM funds initially compensated school districts for the absence of property tax revenues from tax-exempt reservations, making it possible for school districts to enroll many reservation children in public schools.

In 1950 P.L. 874 was passed providing funds to school districts impacted by federal activities, P.L. 815 provided funds for school construction in federally impacted districts. Both laws were enacted in response to financial pressures on states in which enrollment and the availability of revenues from local sources had been adversely affected by federal activities, and neither was designed to aid Indian children. In time, however, they served to expand the role of the federal government in Indian education.

With the extension of P.L. 874 to include federal assistance for Indian trust land JOM became the prime funder of supplemental programs, such as remedial and tutorial programs, curriculum development and early childhood education projects. Also, instead of contracting only with states to operate schools with JOM funds, the BIA recently began contracting with tribes and tribal organizations. This has given Indian parents and tribal communities a much stronger voice in the use of these funds. Under the present regulations, children who are counted for JOM purposes must be at least one-fourth degree Indian and must be members of tribes whose lands are held in trust status by the federal government, but they need not reside on or near reservation lands. In Oklahoma and Alaska only the one-fourth degree requirement is applicable since there are no reservations in these states.

P.L. 874 initially excluded Indian children from consideration when determining a local education agency's entitlement to federal impact aid. In 1953 the law was amended to include Indian children residing with parents living or working on Indian lands. Moneys went into the general operating budgets of local school districts.

P.L. 874 was later amended to include *all* children who reside on Indian land, regardless of where their parents worked and whether

or not their parents were Indian. Amendments also were made to the act by the Indian Education Act of 1972 and by the Indian Basic Education Act of 1978. Whatever the original intent, some jurists cite the Congressional amendments to these two statutes and their importance in practice as indications of a federal fiscal commitment to Indian education. These programs provide considerable federal funds that make up for any loss of tax dollars from nontaxable Indian lands and, in some cases, can exceed the loss.

In 1965 the Elementary and Secondary Education Act (ESEA), Title I, authorized funding of programs that provided special opportunities for disadvantaged students. When first enacted, however, it had no explicit provisions for the inclusion of Indian children, a situation corrected later by treating BIA as the 51st state for purposes of receiving funds.[6]

Probably the most comprehensive federal commitment to Indian education came with P.L. 92-318, the Indian Education Act of 1972, aimed at all Indian children in the public schools regardless of tribal affiliations. Part A amended P.L. 874 and provided new funds for pilot programs and projects designed to meet special educational needs of Indian children, such as bilingual/bicultural classes, guidance and counseling, and culturally relevant programs. Part B was for special grants, such as for alternative schools, and Part C was for adult education. This act also created an Office of Indian Education with the Department of Health, Education and Welfare to administer the program.

The Indian Self-Determination and Education Assistance Act, P.L. 93-638, passed in 1975, was designed to strengthen tribal government and to increase Indian participation in the education of Indian children. In 1978 P.L. 95-561, Title XI (the Indian Basic Education Act), amended P.L. 874 to include Indian tribal participation in impact aid program planning, and overhauled the BIA system of financing and administering BIA schools. P.L. 95-561, Title XI, also amended Part A of the Indian Education Act of 1972 to include "culturally related" education needs. This amendment was a tremendous victory for Indian parents and educators who had long sought a culturally relevant curriculum emphasis for their children.

Fulfilling the Federal Commitment

At a 1977 Congressional hearing, Congressman Michael Blouin asked Earl Barlow, then the Superintendent of the Browning Montana School District (but currently the director of education for the BIA), what the federal involvement should be in Indian

education. Barlow replied that, in his judgment, the basic legal responsibility for Indian education lay with the federal government and that the federal government had largely negated this role.[7] A number of other educators agree with Barlow that the federal government has not been fulfilling its basic commitment to Indian education.

In regulations adopted in 1979, however, the BIA stated that it is the current policy of the bureau to assure that comprehensive education programs are provided for all Indians. Although the ability of the Interior Department to fulfill this policy may be limited in some respects by financial constraints, the responsibility to Indian education is also to be carried out by the Assistant Secretary serving as an advocate for Indian tribes in education matters before the federal, state and local governments.

Indian educators believe that the federal government must continue to provide supplemental programs for Indian students through JOM and Indian Education Act funds, which enable school districts to provide programs that would not be possible solely with district revenues.

In addition, these people believe, the federal government should provide more aid for school construction. Because of the creation of Indian reservations through federal treaties, this land is tax exempt. Since school construction is usually funded through property tax levies, public schools located on nontaxable reservation lands are at a disadvantage in financing construction. Under P.L. 815, the federal government has already funded some (actually very little) school construction on Indian lands, so that a precedent has been set. However, the Congressional appropriations are always far short of meeting the cost of construction for the schools on the P.L. 815 application list.

The federal government also needs to rectify the shortage of Indian people in professional positions of education, with the emphasis placed on training Indians as teachers and administrators, in curriculum development, bilingual program development and education research. The dearth of Indians in the education profession has long been recognized. A modest effort has been made through the Indian Education Act of 1972 to provide some teacher training; however, this program has not been adequate in either dollars spent or number of people trained.

Indian educators insist that, whatever philosophy the federal government is pursuing, it is still not fulfilling its basic responsibility in meeting the education needs of Indian people. They cite the

bureaucracy evident in federal agencies and what they believe is the refusal of federal agencies to delegate many of the responsibilities for Indian education to Indian people.

In 1970 President Nixon suggested in his annual message to Congress that we have turned from the question of whether the federal government has a responsibility to Indians to a question of how that responsibility can best be fulfilled.

Congressman Albert H. Quie, long-time ranking Republican member of the U.S. House of Representatives Education Committee and now Governor of Minnesota, offered his opinion of the federal responsibility in a 1977 Congressional hearing:

> After listening to the problems of Indian education along the way, I come to the conclusion that under P.L. 874 we ought to provide for all Indians on reservations who are attending public schools the basic support which is the equivalent of the local and state expenditure for elementary and secondary education.

Congressman Quie's solution was incorporated into P.L. 95-561, Title XI, in that public schools on reservation land are to receive an additional 25 percent of P.L. 874 formula funds over nonreservation impact aid school districts.

How various federal agencies define "Indian" often confuses and complicates federal responsibility toward Indian education. Various federal authorities define this term differently for funding and programmatic purposes. This lack of uniformity, as well as conflicts with tribal definitions of membership, creates occasional confusion. This problem is explored in detail in the final chapter of this report.

Also, at the writing of this report, Shirley Hufstedler, Secretary of the U.S. Department of Education, was submitting a report on the "definition of Indian" to Congress, as mandated by P.L. 95-561 (Title 4, Section 1147). Congress will hold hearings on the recommendations later in 1980.

III. State Involvement

Introduction

As our nation has evolved, so has our system of education — with many layers of decision making. Notwithstanding various programs of federal aid, the states clearly control elementary, secondary and postsecondary public education. The federal government, which once exercised control over Indian education -- through agencies like the BIA — has now indicated that states should educate Indians, as they do other citizens.

The Assistant Secretary of Interior for Indian Affairs has recognized that it is his responsibility to be an advocate for Indians in matters of education to assure that comprehensive education programs are provided. This includes serving as an Indian advocate before state and local education departments and districts. This is a new policy that should give tribes greater power in their dealings with state agencies.

Decisions by state supreme courts, moreover, have said that the states have "unlimited responsibility" to be involved in the education of all children. The U.S. Supreme Court has held that it is a legal and constitutional right and prerogative for education to be directed by the state.

Legal scholars sometimes insist, therefore, that because Indian education is not a constitutionally designated federal responsibility and is included under powers reserved to the states (including education of all children), educating Indian children also falls into the state's realm of responsibility.

Many Indian leaders believe that states have a basic responsibility for Indian education, but do not mandate it by legislation or education policy as they should. States counter that local school districts determine curriculum content, and state direction of curriculum may not be realistically achieved in view of the concept of "local control of education."

State policy makers believe that the education of Indians is a joint responsibility of the states and the federal government. They suggest that the federal portion relates to the historical and

political relationship between Indians and the U.S. government, and the state portion relates to the fact that Indians are indeed citizens of states, and state constitutions provide for public education of all state citizens.

In recent years, states have sought to extend their jurisdiction over tribes and have included education on the reservation as a state prerogative. Indian tribes insist that recent 1979 federal laws — cited elsewhere in a chapter on tribal involvement with Indian education — clearly reinforce the concept that education of Indian children on the reservation is the *primary* responsibility of the tribes and not of the states. Court cases — including *Williams v. Lee* 358 U.S. 217 (1959), *Rincon Band of Mission Indians v. County of San Diego* 324 F. Supp. 371 (S.D. Cal. 1971), *Aqua Caliente Tribal Council v. City of Palm Springs* 374 Fed. Supp. 42 (C.D. Cal. 1972), *Snohomish County v. Seattle Disposal Company* 425 P.2d 22 (Wash. 1967), *Santa Rosa Band of Indians v. Kings County* 532 F2d 655 (9th Cir. 1975) and *Colliflower v. Garland* 342 F2d 369 (9th Circ. 1965) — along with federal laws are cited by the National Tribal Chairman's Association to demonstrate that education of reservation Indian children is a matter best decided by tribes and their established tribal education departments. Therein lies a basic conflict between state and tribal roles in Indian children.

States indicate that education for *all* children is their primary responsibility. Tribes counter with justification that federal treaties and constitutional law give them the responsibility of education for all Indian children residing on the reservation and the option of urban alternative schools. States have a constitutional prerogative to operate free public schools for all children — including the 75 percent of all Indian children attending these schools. Within the free public education system, states, moreover, do have the obligation to provide the best possible education for *all* children — including Indians — who are in attendance. Tribal people suggest they do not do so for Indian children.

State Perspectives

In response to a questionnaire sent to state departments of education by the American Indian Policy Review Commission Task Force in 1976, many state officials suggested that their responsibility was the same for all students and they made no special effort to identify any special Indian needs. Only four states (Minnesota, Montana, Wyoming and California) had prepared specific education reports on Indians since 1969; most had no special certification provisions for those teaching Indians or Indian

studies. Some state educators did not believe that the role of Indian parents in the education process should be expanded, but others indicated that opportunities for input from Indian tribes, communities and parents were important and necessary.

Depending on the area or state, serious financial inadequacies exist for a number of school districts that serve Indians. These are often attributed to inadequate local tax base because of nontaxable Indian lands held in trust by the federal government. However, most states have an equalization program for school finance, and school districts educating Indian children receive federal money for basic support and for categorical programs; thus, Indian lands should no longer be a reason for insufficient funding.

It is inaccurate to assume that increased funding is the sole answer to the problems of Indian education. In fact, some local district superintendents who were contacted by the staff of the ECS Indian Education Project do not consider school finance to be a serious problem. Instead, a major problem may be the way in which BIA and Department of Education dollars are allocated, and how narrowly categorical programs are focused. On the other hand, local school districts differ in results achieved with available dollars.

Equal Opportunity and State Responsibility

In 1924 President Calvin Collidge signed the Indian Citizenship Act. It declared that "all non-citizen Indians born within the territorial limits of the United States" were citizens. This act has been used increasingly by the government, the courts and some Indian people to urge states to treat Indians on an equal footing with other citizens for services, including those concerned with a free public education.

A number of policies support the position that states are, indeed, responsible for the education of Indian children. Recently, the Secretary of the Interior stated that "Indian children are entitled to the same opportunities for public school education as are provided for other citizens living within a state." In a letter to former Governor Dan Evans of Washington, the Chairperson of the Washington Legislature's House Subcommittee on Indian and Migrant Education, states, "since most of those Indian students are educated in Washington State's public schools, the burden of providing appropriate education programs for Indian children falls primarily and directly on the shoulders of the state."

An example of state acceptance of responsibility for Indian

education can be found in the Alaska Constitution that states "all persons . . . are equal and entitled to equal rights, opportunities, and protection under the law." Alaska has moved to assure equal education opportunity for all Natives, including those children in schools formerly operated by the BIA.

Montana has committed the state to the preservation of the cultural integrity of the Indian in its constitution. Minnesota has acknowledged its commitment through statutory means. Other states have also assumed responsibility through state statutes.

In Washington the Superintendent of Public Instruction, in 1976, wrote a directive stating that the superintendent's office "has accepted the constitutional responsibility to ensure that each student attending the public schools, including Indians, has equal education opportunity." This directive also spells out a comprehensive plan calling for all public schools in the state to effectively and efficiently improve and expand Indian education. These are but some of the examples of how states are addressing their obligations to provide equal opportunity for all Indian and non-Indian students.

The Courts

The Fourteenth Amendment makes it a state responsibility to afford educational opportunity to all children, including Indians, whether they reside on or off reservations. The equal protection clause of the U.S. Constitution has been interpreted to prohibit state differentiation on the basis of race, unless there is a compelling state interest to the contrary. This responsibility has been clear since the Supreme Court's 1954 decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

Lower courts often cite *Brown* in discrimination cases, stating that when a state has undertaken to provide education it must offer this opportunity to *all* on equal terms. Such an obligation extends, of course, to reservation Indians regardless of the historical role of the federal government in Indian education or the difficulties of educating children who may be from remote areas or who may have language or cultural differences.

Actions of school districts that differentiate between several classes of people on the basis of race are subject to strict scrutiny in judicial proceedings. Courts have found that, when equal education opportunities have been clearly denied, two principles must apply. The first principle is that the state must provide each child with equal access to educational resources. The second

principle requires that the state must compensate for any inequalities among children, and make sure that each child has an opportunity to reach an equal level of educational achievement. Generally, the courts have based decisions on the first principle, but not often on the second. Thus, an Indian child whose family speaks a native language may be denied an equal education opportunity when he or she is taught only in English.

There are several landmark decisions enforcing the responsibility of the state for Indian education. For instance, *Piper v. Big Pine School District* 193 Cal. 664, 226 P.926 (1924) was an early case in which an Indian demanded equal access to a public school education. The court held that the school district was not excused from admitting her simply because there was a federal Indian school also in the area. In *Hootch v. Alaska State-Operated School System* 536 P.2d.793 (Alaska, 1975), the plaintiffs charged that by failing to provide high schools in most small, remote native villages, the state had denied secondary school-age children rights under the state constitution, which required "a system of public schools open to all children of the state." In reply, the state argued that it was moving in the right direction, and the court ruled in favor of the state. In an appeal to the state supreme court, the latter ruled that "open to all" did not require that schools be constructed and operated in all villages. While the court did not rule on the equal protection question, the case and its implications persuaded the state board of education to adopt regulations stating that every school-age child had the right to be educated in local community schools. Alaska is now in the process of constructing numerous small village high schools.

In *Natonabah v. Board of Education* 355 F. Supp. 716 (D.N.M. 1973), the court said, "an equal educational opportunity, once the state has undertaken to provide it is a right which must be made available to all on equal terms." Hence, school district policies and procedures in the use of funds that worked to the disadvantage of Indian children were found to be unlawful.

Serna v. Portales Municipal Schools 351 F. Supp. 1279 (D.N.M. 1973), was a case in which the plaintiffs charged the school with failing to provide learning opportunities that satisfied the education and social needs of their children. The Serna family stated that the school provided an education program tailored to an English-speaking, white, middle-class family, whereas their own children came from an environment where Spanish was the predominant language in the home. The plaintiffs further claimed that, although the bilingual approach was used, deficiencies still existed, such as in the I.Q. test. The court ruled that the Serna

children had been denied equal education opportunity and equal protection. A number of Indian jurists and tribal leaders have cited this case as germane to the cause of Indian equal education opportunity.

In regard to financing equal education opportunity, *San Antonio Independent School District v. Rodriguez* 411 U.S. 1 (1973), has been cited by Indian educators. The case questioned whether a state had to equalize per-pupil expenditures made by school districts, which were unequal due to the disparate local property tax base in a school district. The court ruled that equalization was not mandated by the equal protection clause of the Constitution, and that when a school district provides each school with a minimum adequate education, rights being requested are not fundamental. What was not clearly stated by the court was whether there was a constitutional violation if students were denied a "minimum adequate education" because of inadequate funding, and whether this might be an impairment of fundamental education rights.

Some courts have ruled that students required to travel excessive distances are denied a minimum adequate education. Moreover, if Indians are the only ones required to travel excessive distances, it would constitute differentiation between classes of people based on race, which is also a violation of equal protection — unless the state can show a compelling reason for such discrimination. Courts have noted that states must fund schools closer to home or make reasonable accommodations for the Indian children.

States that rely heavily on a local tax base for financing education are at the core of the school finance problem. Several courts have found that inequalities among students in such systems violate state constitutional protections. The Supreme Court has held that the fact of unequal per-pupil funding is not in itself a violation of the federal Constitution's guarantee of equal protection. The Court has left open the question of whether there would be a violation if it were shown that the inequality deprived some children of a "minimum adequate education," while furnishing such an education to others.

In *Milliken v. Green* 380 Mich. 1, 203 NW2d.457 (1974), the Michigan Supreme Court found that "public education is a state matter and the financing of public schools is a state responsibility." It also found that the state public school finance system unconstitutionally discriminated against minorities, including Indian children.

Despite recent court decisions, states are sometimes still reluctant to assume any greater financial burden for the special educational and culturally related needs of Indian children. Many states are not convinced that they have a legal obligation to provide such unique education services. Indian educators, however, feel quite strongly regarding the state service role. Myron Jones, director of Indian Education Training, Inc. of Albuquerque, recently stated in a Congressional hearing, "I think the state has exactly the same responsibilities to Indian students that it has to all others — anyone within the public school system — and no discrimination, financial or otherwise, should be made in terms of providing education services."

Current State Commitments

In a 1978 study David Getches analyzed 24 states with significant Indian populations to determine present program commitments to Indian education.[8] Of the states analyzed, about half have special programs uniquely addressed to the Indian child. For instance, Alaska has regional resource centers that provide a wide variety of administrative and support services for Indian children. State appropriations also provide bilingual and bicultural education funds for schools that have eight or more pupils of limited English-speaking ability, correspondence study for students who live too far away to attend public schools, and reimbursement to school districts for nonresident students from areas without school facilities of their own.

Minnesota's American Indian Language and Culture Education Act was passed in 1977 and funded again in 1979. This law provides for language and culture programs in elementary and secondary schools and also allows the granting of teacher licenses in Indian Language and Culture to persons who have the required abilities but not necessarily a college degree. The act also provides for teacher aides, maximum involvement of Indian parents in the education of their own children, revised and improved testing procedures, and a statewide needs assessment identifying Indian children, as well as their achievement test scores, dropout rates and other data important to the school programs.

Montana recognizes in its constitution the need to preserve Indian culture and traditions. The state also has developed a master plan and legislative mandate that calls for an inclusion of Indian traditions and culture in the education process. Until recently Montana had a mandatory Indian studies program for teachers that involved them in the study of Indian culture and traditions.

The law is now permissive and allows local boards of education to decide if the Indian studies training will be continued.

In California the State Office of Indian Education provides funds for Native American education programs in districts enrolling 10 percent or more Indian students. The funding formula is one-half of the state per-pupil expenditure times the number of Indian children in the school district. For a school to qualify, the American Indian children must reside not only in the district but also on a reservation.

It has been mandated by the state of Washington that Indians are to participate in every aspect of education, including membership on school boards. Education committees and education agencies are involved in the development and evaluation of special programs for Indian children. Teachers of Indian children are to be specially trained, and procedures are to be implemented to identify Indian students in the public schools. Finally, Indians are encouraged to upgrade their own skills and achieve professional status so that more will be directly involved in the education of Indian children.

Wisconsin uses a master plan for Indian education that provides maximum education opportunity for Indian pupils enrolled in public schools. This state also involves the Indian community in all decision making procedures and administers the JOM Program in compliance with the regulations and policies promulgated by the BIA. The Great Lakes Inter-Tribal Council's Education Committee is the state advisory committee for Indian education and offers considerable input. On the local level, education committees are organized for direct involvement in all planning, curricular and program decision-making matters.

New Mexico provides for the education needs of linguistically and culturally different students, including Native American children, through the provisions of the Bilingual Multicultural Education Act of 1973. Education programs (kindergarten through sixth grade) are conducted for Navajo, Apache and Pueblo Indian students in some of the school districts in the state. All of the school districts with Native American students are eligible to participate in this state program funded through the state equalization guarantee distribution formula. New York contracts with 12 adjoining public school districts and 5 boards of cooperative education services to provide education for Indians on eight reservations and Oneida Nation lands, with no local contributions required. This state also provides dollars for state scholarships and for libraries on the reservations. Other states, like

North Dakota, provide planning and development funding for Indian education, while still others provide funding for bilingual and bicultural programs, college scholarships and centers for Indian studies.

Some Alternatives for States

A number of both Indian and non-Indian educators want the state to encourage options that permit Indian-operated schools. They also desire special state support for Indian-operated schools. Parents and community representatives are not often a part of the administration of public schools and school districts, and thus remain uninvolved in decisions that affect the schooling of their children. Tribes suggest that states may need to adopt policies that encourage parents to participate in education policy-making decisions at the local level. Tribes also cite the lack of Indian representation on local school boards.

Some also suggest that school programs in which Indian pupils are enrolled are geared to the needs of non-Indian children. These education leaders contend that administrators and teachers usually are non-Indians, that Indians are tested and graded against standards based on the white population, and that Indian pupils are not motivated to learn in such an unsupportive atmosphere. In-depth bilingual and bicultural programs and programs to prepare more Indian professional personnel for employment in the schools are suggested as answers to these problems. Teacher certification and inservice programs also should be geared more directly to the needs and problems of Indian children. Some Indian leaders insist that in-depth sensitivity training is required. They also suggest that certification requirements should be changed to allow qualified non-degreed Indians to teach Indian language, history, art and music.

States need to realize that Indian pupils are not significantly different from other students in terms of their basic academic abilities. Like many other poverty children, they are commonly underachievers at verbal-dependent tasks who have a high, early dropout rate. Indians believe that Indian children find it difficult to reconcile their value system with that of the Anglo society but that they should be prepared for roles in both the Anglo and Indian cultures — a task that most schools may not be able to perform.[9]

A 1976 report of the National Advisory Council on Indian Education indicates that the states need to combat discrimination in the schools through regular communication with the various

Indian communities and tribes. States lack vigorous affirmative action policies favoring the hiring of Indians to work within the various administrative structures of the school system. Local districts counter, with some justification, that they do make strong efforts to hire Indian teachers but advertised positions bring little or no response from Indian applicants. However, some Indian teachers are reluctant to accept positions where they are the only minority people and where they feel administrative support for Indian education is absent.

Educational success requires that Indian children be provided an opportunity to acquire basic skills, be able to attend on a regular basis and be able to relate to successful Indian people as role models. Indian children should also have a basic understanding of good human relations; be given opportunities to develop positive self-concepts, cultural awareness and Indian group identity; have the same chance for higher education and career choices that other students have; and be able to acquire information regarding the resources available for helping them achieve their goals. Public school systems can maximize the desire of students to move comfortably between the Indian and non-Indian cultures by teaching skills and competencies in both areas. Effective teaching of tribal culture, however, requires a joint effort between the school and the particular tribe.

Higher Education

A 1979 survey performed by the Indian Education Project for the Education Commission of the States reveals that a number of Indians and non-Indians see a definite role for the states in higher education. These people see the need for state colleges and universities to educate Indian students, to train Indian leaders and to create teachers sensitive to Indian needs and concerns. A number of state colleges and universities do provide Indian studies, tribal management degrees, cooperative inservice programs and sensitivity training for potential and active teachers, as well as important support services for Indian students.

Also, 17 community colleges exist that are chartered by tribal governments. These institutions offer degree programs to Indian students residing on or near reservations. At various stages in the formal accreditation process with regional accrediting associations, these colleges advance toward full accreditation by operating their institutions in accordance with required rules and regulations. The schools also maintain "linkage agreements" with state institutions of higher education enabling them to offer credit for coursework offered to their students.

Degree programs that enable students to transfer more efficiently and to succeed more readily in four-year institutions are emphasized in the tribally-controlled community colleges. Tribally-controlled institutions also help to prepare Indian students to assume professional roles and responsibilities in their various Indian reservation communities.

IV. Tribal Involvement

American Indian tribes and individuals have long been perceived the objects of a "benevolent" transformation of their cultures and societies through formal education and schooling. In passing negative historical judgment on the government's Indian education policy, the U.S. Senate Subcommittee on Indian education in 1969 determined that the government's educational policy toward American Indians had two historical roots, a self-righteous intolerance for tribal communities and cultural differences, and a continuous desire to exploit and expropriate Indian lands.[10] American Indian individuals and communities have been provided and often compelled to receive American formal education not only out of purely ethnocentric reasons but also out of a desire to use education and its assimilative purposes as a central vehicle for facilitating the objectives of a national Indian policy associated with the political and economic interests of our American society. Though many of the overtly coercive aspects of education programs have been eliminated, American education has not lost its basic assimilative objectives nor has the structural and functional relationship of education systems and institutions to Indian communities and tribes changed significantly.

In a memo addressed to the Minnesota State Board of Education presented as evidence at the Board's Indian Education hearings, March 16, 1976, members of the Red Lake Chippewa Tribal Council and education officials of the tribe and the Red Lake Public Schools stated:

> The success of the (present) educational system is based on how its products can or have been adapted to this society's requirement and can thus be assimilated. As a people we have fought this kind of influence and attitude for centuries. It is of little use to point to community control of local schools when decision and policy makers are operating under this mainstream philosophy of education.[11]

Closely implicated in a discussion of tribal role and responsibility in Indian education is the ability to affect and/or determine education policies not only to enable or compel effective instruction practices but to enable education systems to function in the social and cultural interests of Indian communities and tribes as they uniquely define that interest distinct from that of the larger society.

The source and nature of the ability to affect and/or determine education on the part of tribal government within the jurisdictional limits of that government is fundamental to any discussion of tribal responsibility in Indian education and vital to enable the determination of effective cooperative roles in Indian education potentially available both within and outside the jurisdictional limits of tribal government.

In discussing the responsibilities of tribal governments in Indian education that appear basic to the integrity of tribal government jurisdiction and tribal government constitutions, a major study on the impact of federal funds on local education agencies enrolling Indian children stated:

> Indian tribes, not states, have the primary responsibility for educating Indian children within tribal jurisdictions. Indian tribes are sovereign and retain all rights of sovereignty except those which have been specifically taken away. Control over education is a basic element of sovereignty. . . . There has been no relinquishment by Indian tribes of the right to control the education of Indian children. This follows from the statement of the United States Supreme Court that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the nation's history." Hence, the involvement of the BIA in the education of Indian children has not been *in lieu of state responsibilities* but rather has been *in lieu of tribal responsibilities*.[12]

Further reinforcement of tribal responsibility and sovereignty over Indian education was given in a June 1980 letter to the Indian Education Project from Wendell Chino of the National Tribal Chairmen's Association. The letter stated that: "In November, 1979, certain education policies became law through the United States Code of Federal Regulations Part 31a; changes required by sections 1130 and 1133 of the Education Amendments of 1978, P.L. 95-561, 25 USC 2010 and 2013. The new policies state that education is a right of the federally recognized tribes, and that it is the responsibility and goal of the federal government to provide comprehensive education program and services for Indians and Alaska Natives; that education is a part of the trust responsibility of the federal government to the federally recognized tribes; and that the Assistant Secretary for Indian Affairs, Department of the Interior shall ensure that Indian tribes and Alaska Native entities fully exercise self-determination and control in planning, priority setting, development, management, operation, staffing and evaluation in all aspects of the education process."

These statements that became law in 1979 give focus and impetus to Indian beliefs that they should have jurisdiction over the education of Indian children. States may argue, however, that these directives are clearly in conflict with constitutional

prerogatives that give states primary responsibility over education for *all* children.

Nevertheless, tribal sovereignty over resident Indians has been reinforced by court decisions and legislation that recognize the prerogative of Indian tribes to exercise authority over all tribal affairs, including that of education for reservation Indians. The doctrine of tribal sovereignty says that tribes should have the authority to educate all Indian children who are residents on the reservation. Federal government policies and law recognize Indian prerogatives of self-determination, which when reinforced by expanded federal financial support of necessary school construction, expanded funding of Indian-operated schools on the reservation, and other areas of concern to tribal members and their children would be advantageous for tribes.

> Though the existence of primary tribal responsibility for the education of Indian children within tribal jurisdictional limits can be sustained as an aspect of a tribe's inherent sovereignty, the corresponding role of tribal governments in Indian education emanating from this responsibility has been, for the most part, severely limited and under-developed. In many cases it is non-existent in past and contemporary arrangements for the provision of educational services for Indian children.
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> In commenting on the contemporary scope of tribal government, some people believe that most tribal governments do not assert all of the powers which they possess. The factors influencing tribes to limit their government activities include limited financial resources and management skills; antagonism from non-Indians within or near the reservation; relationships with state and local authorities; and the supervisory power of the BIA. Current arrangements for the organization and operation of public school districts with the jurisdictional limits of tribal governments illustrates in varying degree all of the limiting factors relative to the assertion by tribal governments that they have primary responsibility for Indian education.
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> Most issues concerning Indian education within reservations having organized state public school districts enrolling Indian pupils are focused on discussions concerning the realities of state control and the existing mechanisms which structure tribal and/or parental input. In a compilation of the major issues, problems and concerns in Indian education, for instance, the Minnesota State Board of Education determined that, as a result of its statewide hearings in Indian education, that the category of "rights and responsibilities" ranked second behind the concern for more research as the major area of concern in Indian education in the state of Minnesota.
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> A breakdown of the primary areas of concern within the category were as follows.
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> 1. Indian Students' rights to Have Special Needs Met
> 2. Indian Parents' Right to Control Indian Education
> 3. Discriminatory Incidents: Non-Indian Staff v. Indian Students

4. Discriminatory Incidents: State Board/Administrators v. Indian Parents-Community
5. Treaty Rights: Guarantee to Educate Indian People/Reflected in State Indian Education Policies
6. Indian Parents' Rights to Form Indian Education Committees
7. Discriminatory Incidents: Non-Indian Student v. Indian Student
8. Indian Citizenship Rights: Guarantee to Equal Education Opportunities
9. Discriminatory Incidents: Non-Indian Staff v. Indian Parents
10. Effects of Forced Desegregation on Overall Education of Indian Students
11. Treaty Rights: Guarantee to Fund Indian Education/Reflected in State Appropriations to Indian Education[13]

Concerning the federal arrangements for the provisions of financial support for school districts within Indian reservations, a study by ACKCO Inc. for the U.S. Department of Education on the impact of federal funds on local education agencies enrolling Indian children states:

> The subject of tribal versus state jurisdiction is extremely complicated. To illustrate the complexity of educational jurisdiction, public school districts (state jurisdiction) are located within the boundaries of reservations. As a result of many factors which cannot be discussed here, non-Indians own a sizeable proportion of former Indian trust property. The presence of non-Indian owned and non-trust property on Indian reservations provides state justification for public school revenue. While the public school district maintains that it has educational jurisdiction throughout the geographical district, Indian-owned and tribal-owned property throughout the same geographical area is under the jurisdiction of tribal governments. Indeed tribes have jurisdiction within the geographical boundaries of reservations. From the standpoint of the public school district, Indian owned property represents a loss of tax base. The federal government, as will be seen in the Legislative Study, has specifically amended the Impact Aid Law to treat such Indian-owned land as impact areas; thus, the school districts are provided P.L. 874 funds for Indian children, who reside on Indian land, attending such public schools. From the standpoint of the tribe the reverse is true. The presence of non-Indian owned land within a reservation represents a loss of income-producing land to the tribe or to tribal members.[14]

Defining the basis of federal assistance for the support of public school districts within reservations is vital to a discussion and resolution of the issues affecting control of education within reservations. State governments and local school districts often justify federal fiscal involvement in Indian education on the basis of a loss of tax revenues caused by the presence of trust status lands within Indian reservations. However, there is clear evidence that federal financial support of Indian education stemming from treaty and statutory responsibility is exercised by the federal government in lieu of tribal fiscal responsibility and *not* in lieu of state fiscal responsibilities.

Two major propositions concerning Indian community participation emerged from the ACKCO study on the impact of federal funds. First, in recognition of the fact that education goals are not always agreed upon, "the community, thought of mainly in terms of parents but including students and all other concerned citizens, should be the final judge of educational effectiveness." Second, "the community must be able to implement its educational goals and judgments. This requires control, rather than mere advisory status, with regard to curriculum and staff."[15]

Tribal Authority, Sovereignty and Legal Rights

The concept of tribal authority for American Indian tribes is a frequent topic for discussion. People not familiar with Indian affairs lack a clear understanding of this concept, and often believe Indian people cannot and should not exercise tribal sovereignty. Roger Jourdain, long-time chairman of the Red Lake Chippewa tribe, addressed this topic in a recent speech and reminded his listeners that tribes do have this authority:

> We have not given up our aboriginal ownership, the title of ownership, and we have not given up our aboriginal rights therein. So as we look at the education program here on the Red Lake Reservation, the Red Lake Council had not given up their role to represent the Red Lake Reservation — the state has no jurisdiction on this reservation; that has been established time and time again.[16]

The powers of tribal governments are inherent powers deriving from a sovereign status that long predated that of the U.S. government, though many of these powers have been restricted and limited through the historical interaction of tribes with the federal government. Tribal governments today retain all aspects of their original sovereignty except those that have been specifically restricted.[17]

Felix Cohen in his *Handbook of Federal Indian Law* describes the nature and scope of the powers of tribal governments:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine

its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.[18]

The Supreme Court cases of *Cherokee Nation v. Georgia* 30 U.S. 1,8 (1831) and *Worcester v. Georgia* 30 U.S. 1,8 (1832) represent the initial expressions of the doctrine of inherent sovereignty as the basis of the powers of tribal government. They further illustrate the other fundamental principle of federal Indian law that the federal government, rather than the state government, has plenary authority in regulating Indian affairs.

In *Cherokee Nation v. Georgia*, Chief Justice John Marshall stated:

> The very term "nation," so generally applied to them (Indians) means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those Powers who are capable of making treaties. The words "treaty" and "nation" are words of our language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well-understood meaning. We have applied them to the other nations of the earth. They are applied to all in the same sense.[19]

Marshall in *Worcester v. Georgia* continued his illustration of the status of Indian tribes:

> . . . and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence — its right to self-government — by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia, under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity.[20]

In holding that the Constitution applied only to the act of the federal government, the Supreme Court in *Talton v. Mayes* 163 U.S. 376 (1896) found that the Constitution could not act as a limitation on the exercise of the powers of the Cherokee Nation, since these powers were not granted by the federal government:

> True, it is that in many adjudications of this Court, the fact has been fully recognized that although possessed of these attributes of local

> self-government, when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States (citation omitted). But the existence of the right in Congress to regulate the manner in which the local powers of the Cherokee Nation shall be exercised does not render such local powers federal powers arising from and created by the Constitution of the United States. It follows that as the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the Fifth Amendment, which as we have said, had for its sole object to control the powers conferred by the Constitution on the National Government.[21]

Recent court cases illustrate that the fundamental principle of federal Indian law expounded on in the early Supreme Court decisions of Chief Justice Marshall are applicable today in any discussion of tribal sovereignty. For instance, the Supreme Court in *McClanahan v. Arizona*, 411 U.S. 164 (1973), stated that it had to be remembered always that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predated that of our government. And in *Colliflower v. Garland*, 342 F. 2d 369 (9th Cir., 1965), the court emphasized that Indian tribes were of course not states; however, they have a status higher than that of states. According to the court, Indian tribes were subordinate and dependent nations, possessed of all the powers as such, and limited only to the extent that they have been expressly required to surrender their powers by the superior sovereign, the United States. Also in *Maryland Casualty Co. v. Citizens National Bank*, 361 F. 2d 517 (California, 1965), the court stated that from the beginning of our government, Indian nations and tribes had been regarded as dependent political communities or nations, possessing the attributes of sovereignty, except where they had been taken away by Congress. The court emphasized that Indian nations were quasi-sovereign nations, but also Indian nations, and as a consequence were immune from suit either in the federal or state courts, without Congressional authorization.[22]

A very clear and comprehensive description of tribal sovereignty has been given by Felix Cohen who stated:

> The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: 1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state; 2) Conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government; 3) These powers are subject to be qualified by treaties and by express legislation of

> Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in Indian tribes and their duly constituted organs of government.[23]

Federal Policy for Indian Education

Eighty years ago the Commissioner of Indian Affairs in commenting on the purposes and objectives of the federal Indian education policy in his annual report to Congress, stated:

> . . . .schools have been organized where Indian pupils may be trained through heart and head and hand in the duties of citizenship, which is the privilege of every person in this country. The educational system is therefore a broad and comprehensive one, and includes not only that which is taught the white boy and girl in our public schools but also that which they learn at the fireside and in Christian homes. This policy, by force of circumstance, is based on the well-known inferiority of the great mass of Indians in religion, intelligence, morals, and homelife. Their theory and practice of existence has been antagonistic to that of the most fortunate whites, who have behind them long ages of slow and successful progress and struggle for supremacy.[24]

The above statement reinforces comments on the 1969 Senate subcommittee on Indian education that suggested one of the historic roots of federal Indian education policy had been a self-righteous intolerance of tribal communities and cultural differences. The rest of the commissioner's report illustrated the more pragmatic purposes and objectives of federal Indian education policy to exploit and expropriate Indian lands also, identified by the Senate subcommittee as an historic root of federal Indian education policy:

> Fitted neither by heredity nor education to be the architects of their own destiny through the mediums of manual labor, as all such people must be, it was necessary that they should be placed upon these reservations not for the purpose of forming or reforming the gnarled and knotted character of the old Indian seasoned by generations of warfare and antagonism, but to prevent him from interfering while the government could secure the necessary time to mold the individualism of his children under the enlightened influence of schools established for their benefit. When this result has been accomplished, the necessity for Indian reservations will cease. The entire educational system of the Indian office is therefore predicated upon the final abolishment of the anomalous Indian reservation system.[25]

The above statement represents the culmination of the development of federal Indian education policy and philosophy that found its first official expression in the House committee on Indian affairs on Jan. 22, 1818 as it met to discuss what was to

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become the basis for the first federal statute in Indian education (which was adopted on March 3, 1818):

> In the present state of our country, one of two things seems to be necessary; either that those sons of the forest should be moralized or exterminated. Humanity would rejoice at the former, but shrink at horror from the latter. Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plough; and as their minds become enlightened and expand, the Bible will be their book, and they will grow up in habits of morality and industry, leave the chase to those whose minds are less cultivated, and become useful members of society.... The committee believe that increasing the number of trading posts, and establishing schools on or near our frontiers for the education of Indian children, would be attended with beneficial effects both to the United States and the Indian tribes, and the best possible means of securing the friendship of those nations in amity with us, and, in time, to bring the hostile tribes to see that their true interest lies in peace, and not in war...." The political and economic considerations on the part of the United States with regard to Indian nations, the desire for expansionism and settlement on Indian lands and the nature of Indian policy generally as it sought to deal with these problems not only affected the goals of Indian educational policy and consequently the nature of curricular programs but education for Indians itself was viewed as one technique whereby the problems of the United States relative to Indians could be resolved.[26]

Federal Indian policy in the 20th century has vacillated from "coercive assimilation" at the turn of the century, to a policy recognizing cultural pluralism and reservation self-government during the 1930s, to a policy of "termination" of tribal governments during the 1950s, and a policy of "self-determination" during the 1970s. Just as federal Indian policy has vacillated between recognition and rejection of the social/cultural and political legitimacy of Indian tribes and communities, education programs for American Indians have been similarly affected. Consequently, education programs during the 1930s and since the 1970s have attempted to emphasize the social/cultural experience of American Indian children as a general approach for making education systems more instructionally functional for Indian learners. These internal changes in emphasis are, however, for the most part designed and incorporated into existing education systems to more effectively facilitate the accomplishment of the broad educational purposes and objectives of the school systems in which Indian children are enrolled.

The most significant aspect of federal Indian education policy since the early 1900s has not been its pragmatic attachment to a vacillating generalized national Indian policy. Significant in the interests of Indian tribes has been a sustained prolonged retrenchment of direct federal operation and management of Indian

schools and the corresponding transfer of this involvement to the states under certain special conditions and constraints important to tribal governments.

Within reservations, the allotment of Indian lands enabled a significant immigration of non-Indians into reservations where they organized "public" day schools under state control for their children. In certain states, such as Minnesota where the Chippewa reservations with the exception of Red Lake lost significant amounts of lands, federal policy encouraged the coeducation of Indian students in state public schools adjacent to and on reservations. As early as 1899 the federal government provided tuition for landless Indians living off reservations to enable their attendance in state public schools and to "encourage the legal school authorities in securing the attendance of Indian children."[27]

The state legislature in Minnesota appropriated funds in 1910 for the maintenance of public schools on reservations in the state. Though these public schools were organized for non-Indian reservation residents and the intention of the legislature was to provide funds in lieu of available local revenue, the development of public day schools was to become an attractive alternative on the part of Indian parents for their children instead of federal boarding schools.[28]

Prior to 1920 Chippewa dollars gained and set aside for education purposes by treaties and agreements that had ceded vast quantities of land and timber had been used to support the federal government boarding school effort. In 1925 and in many subsequent years, Chippewa funds for education were directed to be spent for "construction and maintenance of additional public schools in connection with and under control of the public school system of the state of Minnesota, said additional school buildings to be located at places contiguous to Indian children who are not without proper public school facilities" and for "payment of tuition for Chippewa Indian children enrolled in public schools of the state."[29] As a result in the state of Minnesota during the 1900s there occurred a direct transfer of Indian students out of federal boarding schools into state public schools.

Many of the specifics of this early example of state control and federal financial involvement in Indian education were to become major principals of a later national Indian education policy detailed by the Johnson-O'Malley Act and the inclusion of Indian reservations under provisions of Public Law 874. Often unrecognized, however, is the extent to which the federal government's treaty and statutorily defined trustee relationship to American

Indian tribes financed the development of public schools within reservations serving non-Indian students as well as Indians, and in many cases the specific funds used for this purpose were the very funds generated by the cession of Indian lands and resources under treaties and agreements with the federal government.

Presently a majority of all American Indian children are enrolled in state public school districts. Almost every reservation has at least a part of its land within the boundaries of a state public school system.

There is, however, no clear pattern. There are reservations where state public school district boundaries are coterminous with the jurisdictional boundaries of tribal government. There are school districts that engulf an entire reservation or a section of a reservation where the land within the jurisdictional limits of a tribal government represents a small percentage of the entire school district. Given this situation, there are also reservations that have as many as five different school districts and, in some cases, more, that crosscut the jurisdictional boundaries of tribal government, none of which have a majority of Indian lands and/or pupils within their boundaries. There also exist situations where a number of school districts are contained within the jurisdictional limits of a tribe. Each of these situations presents different implications for the nature of state tribal relations in education and for the potential for exercising tribal responsibility.

Tribal Role and Responsibility in Education Affairs

Given the historic policy of the federal government in Indian education and the transfer of a primary federal role in the operation and management of Indian schools to public schools, there exist important limitations on both the federal government and state government that recognize education as an aspect of a tribe's inherent sovereignty.

In *United States v. Imada* 1 P. 724 (Mt. 1881) the issue of compelling Indians to attend school for purposes and objectives established in federal statutes was heard. The court determined that "while the purpose of the Indian Education Act of 1819 was to civilize and educate Indians, it cannot be invoked to force upon Indians an education nor to compel them to adopt the modes of civilized life." It further determined that it made no difference if the tribe in question had a treaty agreeing to formal education or a provision requesting the Indian agent to see that education provisions of a treaty were strictly adhered to. The federal government in agreeing to provide education did not give any

power of compulsion on the part of the government, or any right to an Indian agent on behalf of the government, to the custody and possession of minor Indian children for the purpose of education.[30]

On March 3, 1893 Congress, however, allowed the Secretary of the Interior to make rules and regulations designed to compel Indian parents to send their children to school. Compulsion in this case meant the denial of rations and subsistence provided by the federal government to Indian parents who did not comply.

In the 1920s when Congress authorized the Secretary of the Interior to enable states to enforce compulsory school attendance laws on Indian children and parents, Congress included an important prerequisite. The extension of state compulsory attendance laws over Indian children and parents *will not apply* "to Indians of any tribe in which a duly constituted governing body exists until such body has adopted a resolution consenting to such application" (25 USC Sec. 231). A federal statute allowing the South Dakota state course of study to be adopted in reservation boarding schools operated by the federal government required agreement from a majority of the parents of the children enrolled at each school (Sept. 7, 1947, 566, 63 Stat. 694).

Presently federal funds for Indian education provided under the Johnson-O'Malley Act, the Indian Education Act of 1972 (Title IV), and Public Law 874 require Indian input in the development of programs using these funds. With the recent inclusion of tribal input concerning expenditures under P.L. 874, mandated by P.L. 95-561, many public school districts are required to have Indian input regarding the majority of the school revenue. The way in which tribes structure this input will in large part determine, under existing arrangements, the ability of tribes to exercise a primary role in the education of tribal children.

In addition to required Indian input in the process, the Education Amendments of 1978 also established a complaint procedure that allows tribes to have a hearing to determine whether or not the federally mandated Indian input has been adequate and meaningful. If it has been determined, therefore, that a tribal complaint has merit and that remedial action is necessary, a tribal council may then choose to pull its children out of a local school district and contract to operate its own schools under Public Law 93-638. The tribes can also request that the Bureau of Indian Affairs provide education services for its children.

The options and potentials available to tribal governments

consistent with federal laws and regulations are many. For instance, the Minnesota Chippewa tribe contracts with the Department of Health, Education and Welfare and the Department of Interior for the administration of these education programs: Johnson-O'Malley, Adult Vocational Training, Higher Education Scholarships and the Talent Search Program. The Minnesota Chippewa tribe also established by resolution a tribal education committee that has the responsibility of overseeing the education programs contracted by the tribe, i.e., establishing policies, guidelines, and programs priorities reviewing and evaluating the tribe's education division operations, and making staff recommendations. Other tribes have created by tribal resolutions chartered corporations of the tribe, complete with communitywide elective procedures to establish a Board of Directors to receive JOM funds and to spend these funds in accordance with applicable federal regulations.

Some tribes have created education committees by tribal ordinance with broad and far-reaching authorities and duties to study and investigate all matters concerning education and to make recommendations for tribal council action in education. A growing number of tribes have chartered Indian-controlled community colleges that provide a college education primarily for its members, but also provide education services to non-Indians. This option is also available for elementary and secondary education, as will be discussed later in this chapter.

Stan Juneau, Vice Chairman of the Blackfeet Tribal Business Council in Montana, believes that an entirely new tribal role in Indian education is needed. He cites a state law, Mont. Rev. Code ANN. Sec., 20-3-333, that states, "The trustees of any district shall have the authority to enter into an agreement with the tribal council or other governing body of an Indian tribe or Indian reservation to perform any function prescribed by this title except as limited by the laws of the United States and its treaties with such Indian tribe."

It is his belief that, in using this state law, tribal governments could develop, implement, coordinate and sanction the education of Indian children through tribal education departments. This system would call for:

- Tribal education departments that would operate all tribally-sponsored education programs.
- One reservationwide education committee to be established with all tribal and public education programs under its direction, similar to a local school board.

- Tribal education codes incorporating tribal education ordinances and relevant state laws approved by the tribal government.

- Establishment of policies and procedures that would coordinate both tribal government plans of operation or constitutions and public school policies and procedures relevant to the tribal goals.

- Goals and objectives, developed from the tribal perspective. Evaluation procedures must also be developed and mandated to the public school system.

- Tribal council resolutions allowing public schools to operate within the exterior boundaries of their respective reservations. This would establish legal authority for public schools and federal schools, as needed, to operate within the exterior boundaries of reservations with the consent of the tribal government.[31]

Tribal concerns for education were outlined by Rick St. Germaine, Chairman of the Education Committee of the National Tribal Chairman's Association (NTCA), at an August 1977 meeting sponsored by the National Indian Education Association:

> NTCA is committed to tribal self-determination in every aspect. We affirm that sovereign tribes have the inherent power to elect their leaders; to determine their own eligibility for membership; to structure their own foundations of education administration; to delegate authority to various reservation-wide committees, boards, and other groups; to develop their own education codes and comprehensive education plans; and, to deal with authorized representatives of the federal government on a government-to-government basis.

Roger Buffalohead, former chairman of the Indian Studies Department at the University of Minnesota, at an October 1979 meeting of Indian people in Grand Porgage, Minn., not only discussed tribal concerns for education and how those concerns had to be addressed by public schools, but also detailed some basic obligations that Indian tribes had to Indian children:

> I believe that every Indian child has an inherent right to achieve a sense of self-realization within the context of his or her own cultural understanding. I believe that every school system must respect that right while providing and enabling Indian children and youth to use education as a vehicle to develop to their fullest potential as individuals and as members of the local community, the tribe, the nation and the world of which they are a part. And I further believe that Indian communities and tribes have a moral and legal obligation, along with the federal government and state educational agencies, to provide Indian youngsters with an education which nurtures and fosters the right of those children to achieve a sense of self-realization as members of their own cultural community and as members of the larger society.[32]

Indian-Operated Schools

Because of their historical sovereignty, Indian tribes often insist that they should be able to control the education of their children. They say that self-determination over all their affairs, including education, has always existed — and that strong moral and legal evidence of autonomy permits them to have authority over school administration, personnel, finances and curriculum. Treaties, Congressional actions, court cases and tribally-developed education systems have reinforced this concept of Indian control over the education of Indian children.

Probably the most controversial education option available to Indian tribes is the operation of their own schools. In recent years, the federal government has funded Indian-operated contract schools primarily on or near reservations and has encouraged tribes to exercise this option. Indian people point to the success of a number of recently established Indian-operated schools, and to historical evidence that their schools have been successful on a number of occasions.

Two outstanding models of Indian-operated education systems existed, for instance, during the 19th century, in the Choctaw and Cherokee Indian nations. In 1841 each of the tribes designed a school system that taught their children to read and write in both English and their tribal language. The success of the Cherokee model is indicated by the fact that the literacy rate among tribal members was considered higher than that of the comparative white populations of either Texas or Arkansas.

Since the early days of this country Indian tribes have continued to design and operate schools for Indian children. There are approximately 44 tribally-operated schools on various reservations. Each school is a separate entity responsible only to its own governing board and community and sometimes to a tribal government. Most have special contractual arrangements with the BIA, but internal policies, procedures and standards are established by the governing board of each school.

It is the intent of Congress, too, that Indian-operated schools or directly funded BIA schools be used as alternatives when public school districts do not satisfy Indian tribal communities. In these schools Indian people set all policy involving the education of their children.

Why should there be Indian-operated schools? First, Indian tribes believe that their history, customs, lifestyle and values should be

reflected in the school setting. Some tribal leaders do not believe that Indian children can be successfully taught by other than Indian educators. Education starts in the home and continues in the school, they feel, and therefore, the home and school experience must complement each other — consistently and with mutual support. Secondly, Indians believe that there is too much competition-based education in the public schools. Indian students face a tremendous transition when they enter a public school, and — all too regularly — they are placed in compensatory programs that discount their potential. For these reasons, many Indians believe that it is only through Indian-operated schools that curriculum and teaching methods can be made to reflect the values, culture, lifestyle and behavior patterns of Indians.

According to the Coalition of Indian-Controlled School Boards, an Indian-operated school is "a school whose policy-setting management is carried out through a duly elected school board primarily composed of Indian people from the community which the school is serving." Thus, an Indian-operated school could be a public school where Indian school board members are a majority, or could also be a privately operated tribal school. The heart of control of a school is that an Indian school board has authority over all administrative aspects of the school, including funds that the school receives.

In a recent newsletter the Coalition pointed out that Indian-operated schools give Indians a chance to express their concern for the children and to help them with their education. Furthermore, such schools are places where adults can learn and make contributions to Indian education. In addition the Coalition asserts that "tribally controlled schools are the most significant education system for Indians today because these schools are restoring an Indian self-image, are lowering the dropout rate and restoring responsibility and discipline among Indian youth.[33]

The American Indian Policy Review Commission has supported this position stating that, "consistent with our policy that the Indian community should have the right to take over the control and operation of federally funded programs, we believe that every Indian community which desired to do so should be able to control its own Indian schools."[34]

The U.S. Office of Civil Rights (OCR) of the U.S. Department of Health, Education and Welfare has ruled that tribally operated schools are not unconstitutional or segregationist in nature. In late 1975 a memorandum sent from OCR to the Minnesota Chippewa Tribe included the following:

> In the absence of a specifically identifiable restriction under a treaty, federal law, or the fundamental law of a tribe, none of which, unfortunately, is fully uniform from tribe to tribe, tribes may exercise powers of self-government, including providing for the education of their members, and may do so without running afoul of Title VI of the Civil Rights Act of 1964.

As political entities, tribes can also legally provide such services as education for their own constituents, to the exclusion of nontribal members.

Special federal Indian legislation and preferences are accepted legally. These provisions have been held to be not racial in nature. Rather, such actions favor members of sovereign entities having a special legal relationship with the United States that is carried out through Congress' constitutionally delegated powers.

In *Morton v. Mancari* 417 U.S. 535 (1974) non-Indian employees in the Bureau of Indian Affairs challenged employment preferences for Indians. The Supreme Court stated that preference "does not constitute 'racial discrimination,'" but is "reasonable and rationally designed to further Indian self-government."[35] Indian leaders have used this decision to defend federally-funded Indian-controlled schools as not being segregationist in nature.

Fisher v. District Court, 424 U.S. 382 (1976) stated that "disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.[36] In *United States v. Antelope*, 430 U.S. 641 (1977) the Court stated that federal legislation dealing with Indian tribes was not based on impermissible racial classifications and was "not to be viewed as legislation of a racial group consisting of "Indians." The Court also warned states that they might not satisfy their own legal obligations to provide education services to Indian people solely by contracting with or otherwise delegating their duties to a tribe, with the result that a separate Indian school is established and Indian children are excluded from regular public schools.[37]

Some persons suggest that tribal schools result from geographic and political separation and do not promote racial segregation. Thus, tribally operated schools are not segregated *de jure*, except to the extent that they result from the creation of Indian reservations and continued recognition of tribal societies under federal law.[38]

Some argue in favor of state-created but tribally operated reservation Indian schools. However, some state courts, including

the Wyoming Supreme Court, have declared that a state-created school district on a reservation is contrary to the equal protection clause in the state constitution. Some federal courts have ruled that attendance and assignment of disproportionate numbers of Indians to certain schools, such as separate Indian-controlled schools, is acceptable within the court-ordered school desegregation plan.[39]

When a school district assigns Indian children to a particular school in response to federally funded programs for Indians, such action would be protected, just as any such federal action would be; and if special federal funds are provided for separate schools, state action that prevented Indians from forming their own community-controlled schools would be unlawful. To make tribally controlled schools work, however, comprehensive state and federal funding is needed.

In urban areas, like St. Paul, Minn. and elsewhere, a tribe or tribes may furnish Indian-operated, alternative schools with JOM funds granted to them for distribution. As long as the urban Indian-operated school meets JOM federal guidelines, the tribe does not usually interfere, and leaves control to the local community and to the local school district. In most instances, the local school district awards the diploma and in effect, exerts control over the urban, Indian-operated school through requiring that its graduates meet standards specified by the state department of education. Through channeling various federally provided funds to it, the local school district also exerts control through requiring the urban Indian-operated school to meet various state program accountability standards. For the most part, tribes exert little or no direct control over the urban Indian-operated school.

V. Conflicts With State, Federal and Tribal Relationships

Introduction

Each of the sections of this report concerning federal, state and tribal involvement in Indian education was written on its own terms, illustrating both the nature and the basis of past and present involvements in Indian education. Furthermore, to the degree possible, each of these three sections was written from the perspective of the government entity in question. As a consequence, some aspects of each section conflict with other sections, primarily as they address definitions and perspectives concerning the primary responsibility for Indian education. Another feature of each of the sections facilitating conflict and/or confusion is the disparity between perspectives concerning roles and responsibilities and the reality of current arrangements for the financing and development of provisions of education services to American Indians.

State governments accept primary authority on the basis that education is among those powers not mentioned in the U.S. Constitution and is therefore reserved to the state. State government, moreso in recent years, reasons that Indians as citizens of the state cannot be denied any rights, benefits or privileges provided by the state constitution including education. Though there is no conflict about the primacy of state responsibility outside the jurisdictional limits of tribal government, there is conflict concerning the finality of such a statement within the jurisdictional limits of tribal government, given the existence of state public school districts within Indian reservations.

Indian tribes also seek ultimate responsibility for Indian education within their jurisdictional limits, considering education to be an aspect of a tribe's inherent sovereignty never formally ceded. However, a corresponding tribal government role in Indian education emanating from this responsibility has been, for the most part, severely limited and underdeveloped. In many instances, it is nonexistent in past and present arrangements for the provision of education services for Indian children.

The most common contemporary arrangement for the education of Indian students within reservations is public school districts, where much of the conflict develops. At one level, conflict could emerge at the state level where the parameters and constraints on the operation of local school districts are. State law that narrowly prescribes the curriculum and instructional limitations, also leaves local school districts with little flexibility in the development of relevant and meaningful curriculum programs and functional instruction practices. At another level, as Indian parents provide federally-mandated input into JOM, Title IV and P.L. 874 programs, conflict may emerge when the local school board determines that Indian parental input is inappropriate or unacceptable.

Within Indian reservations, the federal conflict and confusion regarding roles and responsibilities is primarily a state-tribal issue. This issue has not necessarily been created by state or tribal governments. This issue may have emerged largely as a result of federal policy that transferred its primary role in Indian education to the states. The transfer began as early as the 1890s and failed until the late 1960s when the JOM program began to require Indian parental input into the governance of education services and programs for Indian children. Since the 1970s federal policy has structured Indian community and parental involvement around federal dollars that come into a school district because of the unique educational needs of Indian learners, and most recently because of the impact of trust status lands within school districts on reservations or school districts, with the provision requiring Indian input into P.L. 874. Such input, from a fiscal viewpoint, is substantial. Federal policy tying Indian input to federal Indian education funds going into school districts has had the effect of facilitating an emerging tribal role in Indian education and has raised within Indian communities significant issues relative to the authority and legitimacy of their input.

The arguments for Indian education off-reservation school districts are multidimensional and complex. Conflicts emerge not only between state governance and the intention and interest of federal Indian education legislation, but between conflicting federal laws and Supreme Court decisions applicable on one hand to education generally, and minorities specifically, and on the other hand applicable to American Indian individuals as members of political entities having unique rights and needs on and off reservations.

For example a conflict emerges between desegregation laws and the intention of the Indian Education Act involving two distinct principles of federal law. These laws reflect different

interpretations of the status of Indians as unique citizens having certain distinct and unique rights and also as minority persons guaranteed the rights of all citizens. If an Indian person is bused or integrated into schools far from his home, the ability to develop unique educational experiences to meet his needs is severely lessened, as is the ability of Indian parents and community to have the envisioned participation in the schools.

Within a number of off-reservation public school districts there exist Indian-operated contract schools. Organizationally, they are incorporated and are governed by a board of directors, usually elected from among parents of students enrolled in the school. Most of these schools are financed under existing legislation by the federal government.

In summary the basis of most conflict and confusion, relative to state, federal and tribal roles and responsibilities for Indian education, centers around issues affecting governance of that education. Almost all commentators on Indian education agree that if significant change in the education status of American Indian children is to occur, instruction programs must be made relevant and meaningful to Indian learners, not only as individuals but also as members of unique social, cultural and political entities.

Specific Conflicts and Issues

State, Federal and Tribal Jurisdiction. There is often a conflict between the purposes of federal laws and the intent of state regulations and laws for the public schools. State laws usually give local school boards final authority over policy matters in all public schools. In recent years, however, Congress has stated that Indian parent committees will participate in public school decision making on behalf of Indian education programs. Such a situation may conflict with the local school board's authority and decision-making power over matters such as policies, personnel and program content.

Moreover, because of the trust relationship between many Indian tribes and the federal government, some states maintain that they often have difficulty enforcing basic school regulations, such as truancy, with Indian students who reside on reservations. This sometimes causes jurisdictional problems between the states and Indian tribes, who may disagree as to how much authority public schools can exert on reservations.

The federal government, too, feels a keen interest in the

preservation of tribal sovereignty and tribal integrity and insists that the states honor this commitment. Federal programs, laws and directives, however, can also confuse the interrelationships that exist between the states and the tribes in Indian education.

In the 1977 Oversight Hearings on Indian Education, John Wade, then director of JOM programs for the BIA, stated that Indian education was a shared responsibility between the state and federal government. Myron Jones, director of Indian Education Training, Inc. of Albuquerque, added, "I think it is a shared responsibility and I think it is a shared responsibility that is being acted on through a combination of state public school laws in most states and federal education laws that affect Indian students, including Impact Aid and Johnson-O'Malley." Congressman Michael Blouin, a member of the Oversight Hearings committee, responded:

> Assuming it is a shared responsibility, somewhere along the line, you have to make an arbitrary decision as to which half of the pie is whose and then, once that arbitrary percentage is set, what can we do federally to require that a state pick up its share of the obligation. I think there are some states that are very, very reluctant to contribute educationally across the board their proper share to education of any students, which has a double impact on Indian populations. Obviously that is something that is failing in these programs today.[40]

States suggest, however, that the federal government has too many national concerns and is too distant from the local classroom to be effectively involved in the direct control of education. Therefore, while the federal government may influence the direction that public education takes, including inequality of opportunity, the states contend that the federal government is not in a position to effectively manage, monitor and administer specific programs for Indian education. States suggest that conflict, confusion and unncessary program duplication could be avoided if the federal government would leave program operations and funding control to states and to school districts.

Funding Confusion Among Entities. As noted in chapter II, how the term *Indian* is defined sometimes creates conflict and complicates the roles and responsibilities of the federal government, the states and the Indian tribes concerning Indian education. Determining who qualifies as an Indian may raise some questions of program duplication, eligibility for programs and accountability for program spending. For instance Title IV of P.L. 92-318, the Indian Education Act of 1972, defines an Indian as follows:

> Anyone who is a member of a tribe, band or other organized group of Indians, including those tribes, bands or groups terminated since 1940, and those recognized now or in the future by the state in which they reside, or who is a descendant in the first or second degree of any such member, or who is considered to be an Indian under regulations promulgated by the Commissioner, after consultation with the National Advisory Council on Indian Education, which regulations shall further define the term "Indian."[41]

For funding eligibility under Title IV students need only be first or second degree descendants of tribal members. There need be no specific blood quantum for students to be counted. The school, however, must have a minimum of 10 Indian students to be eligible for Title IV aid — except in Alaska, California and Oklahoma, which need have only one Indian student enrolled in the public school district.

On May 25, 1918, Congress passed an appropriations act, 40 Stat. Chap. 86 (1918), that established the BIA's guidelines for determining who is an Indian for the receiving of federal services. This act states, "Hereafter no appropriation, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood . . . wherein they live and where there are adequate free school facilities provided." Present guidelines for services to be provided by the BIA suggest that an Indian is defined as anyone with one-fourth degree Indian blood, who is a member of a federally-recognized Indian tribe, and who lives on or hear a reservation or resides on trust lands under BIA's supervision. These varying definitions further cloud eligibility of Indians for federal dollars for education.

To establish school district eligibility for federal funding, different counts of "Indians" must be made to comply with the various statutory definitions. In each case, who is or is not counted as an Indian influences the funding levels and eligibility of individual schools.

JOM funds are normally distributed on a per capita basis, based on the number of Indians in the school district, and are to be used only for Indian children. For JOM purposes, Indians are not only identified as reservation Indians but can be also Indians intermingled with the general population in urban areas.

Impact Aid funds from P.L. 874 constitute a very important source of federal revenue for many school districts enrolling Indian students. P.L. 95-561 amended this bill and increased Impact Aid funding for children residing on Indian lands to 125 percent of the normal entitlement. The added money can be paid

to the school district only if Indian children participate equally with non-Indians in the total education programs. Tribal and Indian parental involvement must also be assured.

Other federal programs also involve complicated eligibility determinations. For instance, a school district qualifies for P.L. 815 construction funds if at least one-third of the student population is Indian, and if it demonstrates that it is trying to raise money through taxes or other financial means and has insufficient funds to provide facilities for its students. The school district may also qualify if at least 10 percent of the students or citizens in the school district are Indians, but only for funds to build schools actually serving Indian students in the reservation areas. In the first instance, construction dollars may be used in schools not necessarily attended by Indians. In the second instance, Indian students must be in attendance. Determining who is an Indian, therefore, affects how many dollars a local school district may receive.

The Indian Education Act of 1972 is aimed at all Indian children in public schools, regardless of tribal affiliation or residence. Some of its provisions also state that the amount of aid for a particular program will be determined by the number of Indian students enrolled in schools of the local education agency. Again, determining who is an Indian carries great significance. Such questions of definition tend also to further confuse the interrelationships between the tribe, the state and the federal government.

The federal government sometimes charges the states and local school districts with misuse of Indian-targeted funds, such as when funds allocated for the needs of Indian students are used in nonrelated programs. Indians charge, too, that often federal funds are used to replace local funding in public schools, thus reducing local efforts to educate Indians. States counter that the federal government does not trust them, and that it confuses the various expected roles and responsibilities for financing Indian education when it bypasses the state and goes directly to the local school district or Indian tribe. The federal government, for example, provides some funds directly to private Indian-controlled schools, yet also insists that the state should be the prime mover of Indian education.

Chief State School Officers believe that federal legislation could eliminate much confusion by having appropriate state agencies administer all federal funding. They generally believe that no funds should flow directly from federal agencies to local agencies,

but should flow through the appropriate state education agency.[42]

The tribes believe that both the state and federal government are responsible for providing the necessary funds for Indian education. They argue that constitutional, legal and moral principles mandate that both political entities are required to authorize funds for Indian education.

States prefer that the federal government continue to fund Indian education programs. Tribes want both the federal government and the states to provide funding. Increasingly, local and state governments find it difficult to bear the full costs of quality education for all Americans, including Indians, and much federal funding is fragmented and uncoordinated, and is not always directed at the children who need it the most. States probably would like more comprehensive, more flexible and better coordinated federal funding of the Indian education programs that states find difficult to fund.

The federal government contributes only about seven percent of the revenue needed for all public schools, and yet accompanying regulations frequently demand educational priorities with which neither Indian tribes nor individual states agree. In order to secure federal funds, states and tribes must adhere to federal regulations for financing school activities, with the funding guidelines often too rigid and inflexible to use the money where it is most needed. Therefore, a consensus on funding priorities and regulations is needed.

Local Financing. Financing of Indian education at the local level is an area of confusion. For instance, states that rely heavily on the local property tax find themselves hard pressed not only to provide education programs and services for Indian children but also for non-Indian pupils as well. A number of states also have inequitable tax bases that penalize the poorer school districts, which in some instances are largely inhabited by Indian people. Indian people, therefore, are not always satisfied with what the local school district provides for their children.[43]

The U.S. Supreme Court has refused to interfere with local school district finance formulas, despite the fact that a number of state courts have rejected local systems of financing. The Court has explicitly refused to interfere even when the examination of a state's per-pupil expenditures reveals wide disparities among school districts. The U.S. Supreme Court has said that in the absence of a definable category of poor people against whom the

financing system discriminates, "the judiciary is well advised to refrain from imposing on the States inflexible Constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever changing conditions."[44]

Indian people maintain that the presence of tax-exempt Indian land does not create a financial burden for the states. They point out that Indian people, tribal governments and reservation economic enterprises generate considerable taxable wealth. Moreover, Indian reservations attract federal dollars, which Indian leaders insist result in a multiplier effect throughout the entire economy.

To support their case, Indian tribal leaders point to studies such as the 1976 report, *Flow of Funds on the Yankton Sioux Indian Reservation*, done by the 9th District Federal Reserve Bank in Minneapolis. This study determined that 1) more than 50 government and private programs on the reservation provided goods and services to residents, 2) about $5 million was spent in the fiscal year 1975 for public and private programs to benefit the reservations and 3) money then spent by the Sioux in nearby counties resulted in the effect of original spending being "multiplied" 3.88 times through respending cycles locally and regionally. Induced spending triggered by Sioux spending was estimated at over $8 million, yielding a total of $10.8 million of spending and respending impact in the area. Indian leaders suggest this picture is repeated in other areas of the nation and is related to the actual ability of the states to pay for Indian education.

In *Prince v. Board of Education* 88 N.M. 543, P.2d, 1176 (1975), the plaintiffs argued that Indians living on nontaxable lands were not eligible to vote in school board elections. The court rejected this argument and held that restricting voting to property owners as "taxpayers" was unconstitutional. Moreover, the court pointed out that, while Indians do not pay property taxes on federal lands held in trust, they do pay other taxes, and certainly a fair share of taxes for the interests of all citizens — thus rejecting the plaintiff's "representation without taxation" argument. The court observed that, in fact, 97 percent of the taxable corporate property in the district was on the Navajo reservation.[45] In other related cases, courts have recognized the extensive subsidies that states and counties enjoy from the federal government because of the Indian's presence. Often these funds would have necessarily come from the state if they had not been furnished by federal agencies;

thus state funds were freed for other, non-Indian education programs.

Indian Control of Schools. The question of whether Indians should control the education of their own children further complicates relationships between political entities. For instance, dual state and tribal school systems in some areas of the country could have duplicate facilities, programs and staffing that could cause unnecessary financial costs for each of the two entities.

Public School Problems. In discussing interrelationships, it is important also to note that Indians believe they are largely excluded from the decision-making processes that involve Indian education. In some areas, for instance, Indians are a majority of the population, yet only a few are school board members.

Indian people also believe that tenure laws permit the public schools to keep some non-Indian teachers and school administrators who are insensitive to Indian students. Moreover, state certification requirements often prevent local school districts from using qualified but non-degreed Indian people for instruction and student counseling. States sometimes fear, however, that to credentialize non-degreed Indian people would dilute the quality and acceptance of programs required by accrediting agencies, and therefore, they hesitate to accommodate Indian people by certifying apparently otherwise qualified people.

In a number of instances, too, JOM money goes directly to the tribes and bypasses the local school district. In these instances, Indian people seek to use school facilities for working with the children and often are refused by local school authorities, usually because of the conflict between the desires of the Indian parent committee and the school administration.

Finally, where federally-funded programs require Indian preferential hiring, school districts usually hire Indian people for various teaching and/or staff positions. In a number of instances, too, where Indian preferential hiring is not required, few Indian people are either teachers or school administrators. Local school districts suggest that they hire the best person available and do actively recruit Indians. However, tribes insist that schools make very little effort to employ Indian people, particularly where large numbers of Indian children attend school. Compounding this problem is a drastic shortage of Indian teachers and school administrators in all schools that enroll Indian children.

VI. Summary

While enormous strides have been made by Indian people attempting to improve their condition, Indian children still do not do generally as well in school as do non-Indian students. Many educators, legislators, Indian parents and tribal leaders are concerned that Indian children must succeed in whatever school system they participate in.

The federal government has used different approaches to Indian education — including the encouragement of mission schools, federally operated schools run by the BIA and through encouraging Indian involvement in public schools and in their own tribally-operated schools. Whatever approaches have been used, the federal government does have a definite responsibility toward Indian education as indicated by constitutional and legal arguments, by legislation and by advancements of the government itself, all of which have acknowledged and defined a government responsibility for and commitment to Indian education.

States did not begin to assume any responsibility for the education of Indian children until well into the 20th century. The Tenth Amendment to the U.S. Constitution, however, makes education a state responsibility, as do such court decisions as *Piper v. Big Pine School District*, *Brown v. Board of Education*, *Natonabah v. Board of Education* and *Serna v. Portales Municipal Schools*.

Tribal people generally believe that they have never ceded their sovereignty over the education of Indian children. Many Indian people feel, too, that they can and would do a better job of educating Indian children. They point to many insensitive non-Indian teachers and school administrators, and to the near-absence of Indian people on many local school boards and other important decision-making committees. The rationale for tribally-operated schools for Indian children has grown from the absence of Indian parental involvement in public schools.

Tribal people sometimes suggest that tribal governments need to develop, implement, coordinate and sanction the education of Indian children, as they have not always done. They suggest that tribes need to enact comprehensive tribal education codes and to establish tribal education departments.

It is the obligation of the BIA to take the part of tribes in their attempts to participate in education policy formulation and to assume responsibility and control of educating their youth. This includes obligations to assist in establishing tribally operated contract schools and to transfer federal education aid away from public schools that do not provide meaningful opportunities for Indian input into policy formation.

As this report has indicated, a number of conflicts arise among the federal government, states and tribes in terms of Indian education. For instance, state laws and regulations often clash with federal directives and sometimes prevent either entity from effectively serving Indian children. Conflict and confusion, moreover, sometimes arise from how the various entities — the federal government, the state and the tribe — define who is an Indian. Determining who qualifies as an Indian raises questions of program duplication, program eligibility, fiscal entitlement and program accountability. Local school districts sometimes find it very difficult to determine what funding they are entitled to. Many of them also do not apply for funding that could aid Indian children, simply because they do not believe that the paper work and consultation with Indian parent committees are worth the amount of added funding they would receive.

Indian people suggest that they feel they are excluded from the decision-making process of public schools. They also feel they know and work with their children better than do non-Indians, and that more Indian people should be hired as teachers and school administrators. For these and other reasons, Indian people believe they should have the basic right and support to educate Indian children in tribally-operated schools.

There are overlapping roles and responsibilities for the federal government, the states and Indian tribes that require a refocusing and redirection of policy. If the continual problems that have hampered the education of American Indian children, youth and adults are to be resolved, all government entities need to cooperate more agreeably and progressively with each other than in the past.

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